

STATE OF CALIFORNIA
OFFICE OF ADMINISTRATIVE LAW
2001 OAL Determination No. 5

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Bill Jones
BILL JONES
SECRETARY OF STATE

April 11, 2001

Requested by: RICHARD MONGEON

**Concerning: CALIFORNIA DEPARTMENT OF CORRECTIONS –
Mandatory Yard Call Policy Applicable to Inmates in
Susanville State Prison**

**Determination issued pursuant to Government Code Section 11340.5;
California Code of Regulations, Title 1, Section 121 et seq.**

ISSUE

Does a Department of Corrections' policy known as "mandatory yard call" that requires inmates to be locked out of their housing at the California Correctional Center located in Susanville between the hours of 8:00 am to 10:00 am every weekday morning constitute a "regulation" as defined in Government Code section 11342.600, which is required to be adopted pursuant to the rulemaking provisions of the Administrative Procedure Act?¹

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1. This request for determination was filed by Richard A. Mongeon, P-24665, AU-7818L, P.O. Box 2210, Susanville, CA 96127-2210. The Department of Corrections' response was filed by E. A. Mitchell, Interim Assistant Director, Department of Corrections, P.O. Box 942883, Sacramento, CA 94283-0001. This request was given a file number of 99-025. This determination may be cited as "**2001 OAL Determination No. 5.**"

CONCLUSION

The policy known as “mandatory yard call” that requires inmates to be locked out of their housing at the California Correctional Center located in Susanville between the hours of 8:00 am to 10:00 am every weekday morning does not constitute a “regulation” as defined in Government Code section 11342.600, and therefore, is not subject to the rulemaking requirements of the APA.

BACKGROUND AND ANALYSIS

At the time of this determination request, Richard A. Mongeon was an inmate incarcerated in the California State Prison at Susanville. He has challenged a policy known as “mandatory yard call” that requires inmates to remain outside their housing or dorm units between the hours of 8:00 am and 10:00 am every weekday in order to facilitate routine cleaning.²

Initially, Mr. Mongeon indicated that this policy applied to inmates in the Arnold Unit of the prison. Later, he stated the policy also “concern[ed] all of C.C.C. Susanville Cascade Yard and Sierra Yard.”³ For purposes of this determination, OAL will treat the policy as applying to inmates in the Correctional Center at Susanville, California.

A determination of whether the Department’s rule is a “regulation” subject to the APA (Chapter 3.5, Division 3, Title 2, Government Code (commencing with section 11340); hereafter, “APA”) depends on (1) whether the APA is generally applicable to the quasi-legislative enactments of the Department, (2) whether the challenged rule is a “regulation” within the meaning of Government Code section 11342.600, and (3) whether the challenged rule falls within any recognized exemption from APA requirements.

(1) As a general matter, all state agencies in the executive branch of government and not expressly or specifically exempted are required to comply with the rulemaking provisions of the APA when engaged in quasi-legislative activities. (*Winzler & Kelly v. Department of Industrial Relations* (1981) 121 Cal.App.3d 120, 126-128, 174 Cal.Rptr. 744, 746-747; Government Code sections 11342.520; 11346.) Moreover, the term “state agency” includes, for purposes applicable to the APA, “every state office, officer, department, division, bureau, board, and

2. Request for Determination, received by OAL on November 17, 1999.

3. Requester's letter of December 15, 1999.

commission.” (Government Code section 11000.)

Penal Code section 5054 provides that:

“The supervision, management and control of the State prisons, and the responsibility for the care, custody, treatment, training, discipline and employment of persons confined therein are vested in the director [of the Department of Corrections]”

The Department is in neither the judicial nor legislative branch of state government, and therefore, unless expressly or specifically exempted therefrom, the APA rulemaking requirements generally apply to the Department.

In this connection, Penal Code section 5058, subdivision (a), states in part as follows:

“The director [of the Department of Corrections] may prescribe and amend rules and regulations for the administration of the prisons. . . . The rules and regulations shall be promulgated and filed *pursuant to [the APA]*”
[Emphasis added.]

Thus, the APA rulemaking requirements generally apply to the Department. (See *Poschman v. Dumke* (1973) 31 Cal.App.3d 932, 942, 107 Cal.Rptr. 596, 603 (agency created by Legislature is subject to and must comply with APA).)

(2) Government Code section 11340.5, subdivision (a), prohibits state agencies from issuing rules without complying with the APA. It states as follows:

“(a) *No* state agency shall issue, utilize, enforce, or attempt to enforce *any* guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a [‘]regulation[’] as defined in Section 11342.600, *unless* the guideline, criterion, bulletin, manual, instruction, order, standard of general application or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA].
[Emphasis added.]”

Government Code section 11342.600, defines “regulation” as follows:

“. . . *every* rule, regulation, order, or standard of general application *or* the amendment, supplement, or revision of any rule, regulation, order, or

standard adopted by *any* state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure [Emphasis added.]”

According to *Engelmann v. State Board of Education* (1991) 2 Cal.App.4th 47, 62, 3 Cal.Rptr.2d 264, 274 -275, agencies need not adopt as regulations those rules contained in a “statutory scheme which the Legislature has [already] established” But “to the extent [that] any of the [agency rules] depart from, or embellish upon, express statutory authorization and language, the [agency] will need to promulgate regulations. . . .”

Under Government Code section 11342.600, a rule is a “regulation” for these purposes if (a) the challenged rule is *either* a rule or standard of general application *or* a modification or supplement to such a rule and (b) the challenged rule has been adopted by the agency to *either* implement, interpret, or make specific the law enforced or administered by the agency, *or* govern the agency’s procedure. (See *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 440, 268 Cal.Rptr. 244, 251; *Union of American Physicians & Dentists v. Kizer* (1990) 223 Cal.App.3d 490, 497, 272 Cal.Rptr. 886, 890.)

For an agency policy to be a “standard of general application,” it need not apply to all citizens of the state. It is sufficient if the rule applies to all members of a class, kind, or order. (*Roth v. Department of Veteran Affairs* (1980) 110 Cal.App.3d 622, 630, 167 Cal.Rptr. 552, 556. See *Faulkner v. California Toll Bridge Authority* (1953) 40 Cal.2d 317, 323-324 (standard of general application applies to all members of any open class).) Because the challenged rule applies to all of the inmates at the Correctional Center at Susanville, it is a rule or standard of general application.

Moreover, the Department's challenged rule interprets, implements or makes specific Penal Code section 5058, which provides that the director of the Department may prescribe and amend rules and regulations for the administration of the prisons.

(3) With respect to whether the Department’s rule falls within any recognized exemption from APA requirements, generally, all “regulations” issued by state agencies are required to be adopted pursuant to the APA, unless *expressly* exempted by statute. (Government Code section 11346; *United Systems of Arkansas v. Stamison* (1998) 63 Cal.App.4th 1001, 1010, 74 Cal.Rptr.2d 407, 411

(“When the Legislature has intended to exempt regulations from the APA, it has done so by clear, unequivocal language.” [Emphasis added.])

In this case, however, the rule in question cannot be a “regulation” *as a matter of law*. Penal Code section 5058, subdivision (c)(1) provides as follows:

“(c) The following are deemed not to be ‘regulations’ as defined in Section 11342.600 of the Government Code:

(1) Rules issued by the director or by the director’s designee *applying solely to a particular prison or other correctional facility*, provided that the following conditions are met:

(A) All rules that apply to prisons or other correctional facilities throughout the state are adopted by the director pursuant to [the APA].

(B) All rules except those that are excluded from disclosure to the public pursuant to subdivision (f) of Section 6254 of the Government Code are made available to all inmates confined in the particular prison or other correctional facility to which the rules apply and to all members of the general public.” [Emphasis added.]

Thus, the Legislature has provided an express statutory APA exemption for *local* prison rules, provided certain conditions are met.

Nothing in the documents filed in connection with this determination suggests that the rule or policy in question is anything other than a local rule which applies solely to the inmates housed at the Correctional Center in Susanville. Thus, based on Penal Code section 5058, subdivision (c)(1), the mandatory yard call policy utilized by the Department of Corrections at its Susanville facility is not a “regulation,” and therefore, is not subject to the rulemaking procedures of the APA.

DATE: April 11, 2001

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